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April 8, 1999

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APR 12 1999

FCC MAIL ROOM

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: CC Docket No. 96-98 Implementation of the Local Competition Provisions in the
Telecommunications Act of 1996

CC Docket No. 99-68 In the Matter of
Inter-Carrier Compensation for ISP-Bound Traffic

To the Secretary:

Enclosed herewith for filing with the Commission are an original plus four copies of the
Comments of the Public Utility Commission of Texas in the above captioned matters. We
are also providing an electronic copy of these comments via your ECFS interface.

Sincerely,

Steve Davis

Steve Davis
Director, Office of Policy Development

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Implementation of the Local
Competition Provisions in the
Telecommunications Act of
1996

CC Docket No. 96-98

Inter-Carrier Compensation
for ISP-Bound Traffic

CC Docket No. 99-68

COMMENTS OF THE
PUBLIC UTILITY COMMISSION OF TEXAS

On February 26, 1999, the Federal Communications Commission ("FCC" or "Commission") issued a Declaratory Ruling ("DR") in CC Docket No. 96-98 and a Public Notice seeking comment on the treatment of inter-carrier compensation for ISP-bound traffic (CC Docket No. 99-68). The FCC held that, because a substantial portion of ISP-bound traffic appears to be interstate or international, the FCC has jurisdiction over this traffic.¹ In addition, the FCC held that it is in the public interest to adopt a rule governing that traffic on a prospective basis.² The Public Utility Commission of Texas (PUCT), having jurisdiction over telecommunications services in Texas, herein provides its comments in response to the Public Notice.

¹ DR at ¶ 1.

² In addition, the FCC held that until a final rule is adopted, state commissions would continue to determine whether reciprocal compensation is due for inter-carrier compensation for ISP-bound traffic.

I. SUMMARY

In response to requests to clarify whether a local exchange carrier ("LEC") is entitled to receive reciprocal compensation for traffic that it delivers to an Internet service provider ("ISP"), the FCC first determined that ISP-bound traffic is largely interstate in nature and subject to the Commission's jurisdiction.³ The Commission reasoned that when analyzing ISP-bound traffic on an end-to-end basis, it is clear that such traffic does not terminate at the ISP's local server, but continues to the ultimate destination or destinations, often at an Internet website located in another state. The FCC then concluded that it has jurisdiction over ISP-bound traffic⁴ because it has jurisdiction over, and regulates charges for, the local network when used in conjunction with the origination and termination of interstate calls.⁵

The PUCT would echo the FCC's tentative conclusion that a rule governing inter-carrier compensation for ISP-bound traffic should reflect the notion that commercial negotiations, driven by market forces, are the optimal means for establishing interconnection agreements.

³ The FCC noted in its Order that clarification was required because competitive local exchange carriers (CLECs) contend that ISP-bound traffic is local traffic and subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 (Telecommunications Act of 1996, Pub L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (1996 Act)), while LECs claim that the same traffic is interstate in nature and beyond the scope of section 251(b)(5).

⁴ The clarification of the jurisdictional issue was not the FCC's only holding. The Commission took the opportunity to issue some subsidiary conclusions. First, the Commission made clear that the jurisdictional determination did not in itself establish whether reciprocal compensation is due in any particular instance. The FCC recognized that parties might have agreed to reciprocal compensation for ISP-bound traffic, or a state commission exercising its authority under section 251 and 252 of the 1996 Act might have imposed reciprocal compensation obligations for this traffic. Second, the FCC held that, absent a federal rule regarding inter-carrier compensation for ISP-bound traffic, parties should be bound by existing interconnection agreements, as interpreted by state commissions. With this background the FCC turned its attention to the possible adoption of a rule regarding inter-carrier compensation for ISP-bound traffic.

⁵ DR at ¶ 8 citing Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992).

Furthermore, it is the PUCT's judgment that the resolution of the compensation issue is best determined under the aegis of the FCC and pursuant to sections 251 and 252 of the 1996 Act.

Finally, the PUCT would emphasize certain policy judgments. First, all seven-digit⁶ dialed ISP-bound traffic should be treated the same until it is shown that the traffic can be segregated and tracked to distinguish the intrastate and interstate portions for billing purposes.⁷ Second, pricing methodologies should discourage regulatory arbitrage and resulting market distortions. And third, national pricing standards should be promulgated that deter forum shopping based on the best "compensation" deal and encourage efficient behavior.

II. NOTICE OF PROPOSED RULEMAKING

In its Notice of Proposed Rulemaking ("NPRM"),⁸ the FCC tentatively concluded that a rule governing inter-carrier compensation for ISP-bound traffic that serves the public interest should strongly reflect its judgment that commercial negotiations driven by market forces are the ideal means for establishing interconnection contracts.⁹ In addition, the Commission proposed that compensation for ISP-bound traffic be based on commercial negotiations undertaken as part of the broader interconnection negotiations between incumbent LECs and CLECs.¹⁰ Finally, the

⁶ All references to seven-digit dialing in these comments also apply to ten-digit dialing. In response to the FCC's notice, these comments focus on ISP-bound traffic; however, if the FCC's investigation regarding the tracking of traffic concludes that local traffic cannot be cost-effectively separated from dial-up ISP-bound traffic, then the FCC should consider applying any rules it develops for ISP-bound traffic to local, non-ISP bound traffic, as well.

⁷ If and when such a methodology is developed and can be implemented inexpensively, it may become appropriate to establish a zero compensation rule for inter-carrier compensation for ISP-bound traffic to effectively have originating and terminating carriers share in the Internet subsidy created by the Internet's access charge exemption.

⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 99-68 (Feb. 26, 1999).

⁹ NPRM at ¶ 28. The FCC went so far as to say that setting a rate for intercarrier-compensation for ISP-bound traffic may be unwise because the actual amounts, need for, and direction of inter-carrier compensation might reasonably vary depending on the underlying commercial relationships with the end-user, and who ultimately pays for transmission between its location and the ISP. *Id.* at 29.

¹⁰ *Id.*

FCC tentatively concluded that as a matter of federal policy, inter-carrier compensation for ISP-bound traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the 1996 Act. The PUCT provides some preliminary comments with regards to compensation for this interstate telecommunications traffic.

III. PRELIMINARY REMARKS

The PUCT generally agrees that commercial negotiations provide the best means for establishing interconnection contracts. Furthermore, the PUCT provides a brief discussion of the FCC's two alternative proposals for implementing a regime regarding inter-carrier compensation for ISP-bound traffic as well as corollary issues.

The PUCT emphasizes that, consistent with the NPRM, these comments apply solely to the issue of inter-carrier compensation for ISP-bound traffic on a prospective basis. These comments do not address the issue of inter-carrier compensation for ISP-bound traffic under pre-existing interconnection agreements.

A. FCC PROPOSALS

The FCC seeks comments on two alternative proposals for treating prospective inter-carrier compensation for ISP-bound traffic. Proposal one would resolve the issue of prospective inter-carrier compensation for ISP-bound traffic under sections 251 and 252 of the 1996 Act; that is, within the confines of state proceedings regarding negotiation, arbitration, and approval of interconnection agreements. Proposal two would provide for the adoption of a set of federal rules to govern inter-carrier compensation for ISP-bound traffic.

The FCC's first proposal has much in its favor. The PUCT has engaged in arbitrating complex interconnection agreements, pursuant to sections 251 and 252 since the passage of the 1996 Act. The PUCT has a comparative advantage vis-à-vis the FCC in this regard. In addition, arbitrating an additional issue, in this case the treatment of inter-carrier compensation for ISP-bound traffic, within the larger context of a state arbitration proceeding is unlikely to unduly tax PUCT resources. Furthermore, arbitrating this issue within a state proceeding would eliminate the need for a separate and administratively burdensome federal proceeding. Similarly, a single proceeding would tend to reduce the costs for new entrants to obtain interconnection and compensation for all services it is permitted to provide. Finally, an integrated state level proceeding would provide state commissions the opportunity to implement appropriate pricing policies for all seven-digit dialed traffic if it is determined by the FCC that ISP-bound traffic and local traffic cannot be reasonably separated.

In the alternative, the FCC suggests the adoption of a set of federal rules governing inter-carrier compensation for ISP-bound traffic. This proposal contemplates that parties, pursuant to a federal rule, would engage in negotiations concerning rates, terms, and conditions applicable to delivery of interstate ISP-bound traffic.¹¹ If the parties fail to negotiate an agreement, the FCC might resolve disputes at the request of any party through an arbitration-like process.

Beyond the administrative reservations regarding a federal arbitration proceeding expressed above, the PUCT is concerned, first, that the integration of agreements reached in different forums may not be seamless -- post-interconnection disputes being more likely than under an integrated state proceeding. Second, strategic opportunities may also manifest

¹¹ It is not entirely clear whether the FCC contemplates that compensation for all ISP-bound traffic would be treated at the federal level or just compensation for the interstate portion of that traffic, with state commissions overseeing compensation for the "intrastate" portion of that traffic. The following discussion applies to both cases.

themselves under the FCC's alternative proposal. For instance, a party that may wish to slow the pace of negotiations for an interconnection agreement would have two forums in which to operate in seeking that end. Third, if the FCC determines that ISP-bound traffic should be treated at the federal level, the FCC and state commissions should strive for consistent pricing of intercarrier compensation for all traffic to avoid the incentive for carriers to engage in arbitrage which can lead to market distortions.

Because of the complexity, administrative inefficiency and potential for inconsistent pricing of ISP-bound traffic and local traffic in a single state jurisdiction, the PUCT counsels against the creation of litigated inter-carrier compensation for ISP-bound traffic before the FCC.¹² The treatment of whether segregation of intrastate and interstate ISP-bound traffic is technically feasible is examined below.¹³

B. APPROPRIATE COMPENSATION FOR THE DELIVERY OF ISP-BOUND TRAFFIC

While the PUCT strongly believes that, if necessary, the arbitration of inter-carrier compensation for ISP-bound traffic should occur at the state level, it also firmly believes that FCC policy leadership on the issue is critical to ensure the broadest possible entry of efficient new competitors, eliminate inefficient entry and irrational pricing, and provide customers the benefits of competition and new technology. The PUCT suggests that the FCC, in a rulemaking, develop broad policy and methodological parameters for consistently treating inter-carrier

¹² Because the PUCT recommends that the determination of inter-carrier compensation for ISP-bound traffic is appropriately treated at the state level, comments on whether the FCC has authority to establish an arbitration process are not offered.

¹³ By raising the issue of the segregation of traffic the FCC seems to suggest, although it is not explicit in the NPRM, that it contemplates different rates for intrastate and interstate ISP-bound traffic.

compensation for ISP-bound traffic that the states would then implement. A rulemaking provides interested parties the opportunity to air concerns and provide suggestions concerning these matters. The PUCT would urge, however, that the FCC permit state commissions to retain the necessary flexibility to price inter-carrier compensation in the light of unique or changing circumstances.

The FCC correctly suggests that efficient rates for inter-carrier compensation for ISP-bound traffic are unlikely to be based entirely on minute-of-use pricing structures.¹⁴ This is because there is an inherent conflict between compensation methods that are usage sensitive and end-user charges that are flat-rate.¹⁵ The flat rate-end-user has no incentive to conserve on calls to its ISP that are terminated by an intervening LEC; and the originating LEC has no opportunity to recover costs incurred when compensating a terminating carrier. Because it is likely to be faced with this issue in forthcoming arbitration proceedings, the PUCT is not prepared to offer a definitive proposal on inter-carrier compensation for ISP-bound traffic at this time. Options discussed in Texas, but not adopted to date, include creating a two-part rate with one part based on a per call basis and the second on a per minute basis. If the per minute component is extremely small, a single per call rate, which would lower billing costs, may be appropriate. Other options include treating local and ISP-bound traffic under a bill-and-keep scheme.

C. SEGREGATING INTRASTATE AND INTERSTATE ISP-BOUND TRAFFIC

The FCC asks whether it is possible, as a technical matter, to segregate intrastate and interstate ISP-bound traffic and whether any rules it adopts should apply to all intrastate and

¹⁴ NPRM at ¶ 29.

¹⁵ This conflict bedevils all compensation schemes where end-user rates are not usage-sensitive while inter-carrier compensation methods are.

interstate ISP-bound traffic. First, the PUCT views this issue not only as a “technical feasibility” issue but also as one concerning the “economic feasibility” of segregating traffic. At this time the PUCT is not in a position to comment on the technical issues with respect to segregating intrastate and interstate ISP-bound traffic but recognizes the complexity involved. Of course, any potential efficiencies from segregating and appropriately pricing intrastate and interstate ISP-bound traffic should not be negated by the administrative costs of segregating that traffic. As overall industry compensation moves, albeit slowly, to “a minute is a minute,” it would seem to be an inefficient use of resources to embark on another audit-driven, traffic-tracking apparatus focused on the identity of a local ISP portal. Moreover, the FCC should investigate not only the feasibility of separating intrastate and interstate ISP-bound traffic but also the feasibility of separating ISP-bound traffic from seven-digit dialed local traffic.

D. ADDITIONAL ISSUES

1. Interconnection Agreements and Most-Favored Nation Provisions

Pursuant to section 252(i) of the Act, interconnection agreements often have provisions (referred to as “most favored nation” or “MFN” provisions) that allow parties to select, to varying degrees of specificity, provisions from the other parties’ interconnection agreements. The FCC notes the possibility that an incumbent local exchange carrier may be inhibited from negotiation or re-negotiation of a contract if competitors are allowed to indefinitely adopt MFN clauses for the length of a contract’s entirety rather than a contract’s termination date.¹⁶ The

¹⁶ This situation might arise, for example, where CLEC₂ MFNs into terms of a three-year contract between an ILEC and CLEC₁ at year two and expects or receives the MFN consideration for the three years of its new contract. CLEC₁ could then opt into CLEC₂’s contract provision at the expiration of its existing contract thus contributing to a loop of successive MFNs precluding any contract re-negotiation by the ILEC.

PUCT has adopted the stance that MFN provisions expire upon the expiration date of the original contract. This precludes the potential loop of successive MFNs described above.

2. Inter-carrier Compensation for ISP-bound traffic and Jurisdictional Separations

The FCC concluded that a substantial portion of – but not all – Internet traffic involves accessing interstate or foreign websites. This raises a significant question with respect to jurisdictional separations. If some of the traffic that has been heretofore considered intrastate local, will now be classified as interstate as a result of the decision in this proceeding, that must be reflected in changes to the Part 36 separations rules. As we recently stated in our response to the report of the State Members of the Federal-State Joint Board on Separations,¹⁷ we agree that comprehensive jurisdictional separations reform is needed, in part because of technological advancements and difficulties in tracking usage for services such as Internet connections.

¹⁷ *State Members' Report on Comprehensive Review of Separations*, CC Docket No. 80-286, In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, December 21, 1998.

We appreciate the opportunity to provide comments in this very important proceeding,
and we look forward to working with the Commission in resolving these issues.

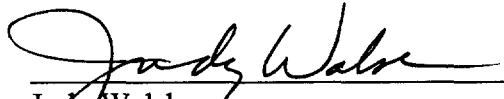
Respectfully submitted,

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